

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

YONY LIMA,

Defendant and Appellant.

B296346

(Los Angeles County
Super. Ct. No. VA144745)

APPEAL from an order of the Superior Court of Los Angeles County, Raul Anthony Sahagun, Judge. Affirmed as modified.

Juliana Drous, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Idan Ivri and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Yony Lima walked through a residential neighborhood armed with a knife. He kicked down the door of Gabriela S.'s house, and held a knife several inches from her chest before he was pushed outside by her husband. Defendant then kicked in the door of Porfirio B.'s house and attempted to stab him. Porfirio wrested control of the knife away from defendant. The police were waiting outside and arrested defendant.

A jury convicted defendant of the attempted first degree murder of Porfirio and assault of Gabriela, among other counts. On appeal, defendant argues the evidence showed he was intoxicated and acting rashly, and did not premeditate or deliberate the attempted murder. He also argues that evidence he held a knife close to Gabriela's chest was insufficient to show he intended to apply force to her. We disagree. We order the judgment modified to correct several undisputed sentencing errors, and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

At about 5:00 p.m. on May 10, 2017, Abraham I. woke up when he heard a banging at the door. Defendant kicked in the front door, and walked in to Abraham's house. When Abraham got out of bed, he saw defendant standing in his bedroom covered in blood and holding a knife. Abraham pushed defendant who swung the knife at him. Defendant said he was looking for someone and was going to kill that person. Abraham told defendant that person was not there. Defendant seemed "deranged" and "look[ed] like a person [o]n drugs."

Defendant then entered another bedroom where Abraham's wife, Gabriela, was standing. Pointing the knife at her, defendant told Gabriela he was looking for someone. He held the

knife three to four inches from the center of her chest. Gabriela ran out of the room, and Abraham was then able to push defendant out of the house. Defendant walked over to the neighboring house of Jose M.

Hearing someone at his door, Jose opened the door to find defendant standing there with a knife. Defendant said he was the devil, and was going to kill Jose and his family. Defendant started stabbing the metal security door. He then ran to the back of the house and tried to climb a ladder to the roof.

Unable to climb the ladder, defendant walked over to the house at the back of property and kicked in the door. Maria M. was sitting at the dining room table with relatives when defendant entered the room holding a knife in his hand. He looked at each of them, repeatedly asking “Where is he?” Defendant then exited the house.

Shortly thereafter, Marta C. heard a knock on the door and opened it to find defendant standing there, bloodied and holding a knife. The screen door was locked, and defendant said, “ ‘Open the door.’ ” When Marta refused, he said, “ ‘If you do not open the door I’m going to kill myself in front of your door.’ ” Defendant proceeded to pull on the door handle and window frames. After a few minutes, he left.

Defendant then climbed over a fence into the yard of Gloria S. and Porfirio’s house. Gloria was out front and ran inside the house, locking the door behind her. Defendant followed her and kicked in the front door. When Porfirio attempted to push back on the door, defendant reached his hand in while swinging a knife. Porfirio grabbed defendant’s hand and pulled, falling to the floor. They struggled for control of the knife, and defendant pulled the knife away, slicing Porfirio’s fingers. Porfirio grabbed

the knife again, and defendant held on to him from behind, biting Porfirio on the back and head. During the struggle, defendant was screaming, “I’m gonna kill you.”

Defendant struggled with Porfirio on the floor for two to three minutes. When defendant tried to push the knife into Porfirio’s stomach, Porfirio yelled to his wife for help. She ran into the kitchen and came back with a lemon squeezer. Defendant watched her during this process. She hit defendant in the head with the lemon squeezer. When defendant reacted to the hit, Porfirio got a grip on the knife and stabbed defendant in the face. Defendant then pushed off Porfirio, stood up, adjusted his clothes and walked out holding his face. The police were waiting for defendant outside, and arrested him.

Defendant was charged with attempted first degree murder, three counts of burglary, two counts of attempted burglary, criminal threats, and three counts of assault. As to all counts, it was alleged he personally used a deadly weapon (Pen. Code, § 12022, subd. (b)(1)).¹ A great bodily injury enhancement (§ 12022.7, subd. (a)) was alleged as to count 10, the assault on Porfirio. The information further alleged that defendant had incurred a prior serious or violent felony “strike” conviction (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)) and prior serious felony conviction (§ 667, subd. (a)), and had served two prior prison terms (§ 667.5, subds. (a) and (b)). Defendant pled not guilty and denied the special allegations.

At trial, the prosecutor argued that defendant committed attempted murder with premeditation and deliberation: “When the defendant entered the building he intended to commit a murder So how do we know that that’s what he wanted to

¹ All further statutory references are to the Penal Code.

do? Well, because that's what he said. 'Where is he? Where is he?' over and over and over again to multiple people. And what did it finally culminate in? A vicious brutal attack on [Porfirio]. That's what he intended to do. He was determined to find [Porfirio] for some reason."

The jury convicted defendant on all counts and found all enhancement allegations true. The court sentenced him to 14 years to life for the attempted murder plus a consecutive term of 26 years and a concurrent term of 58 years. The court stayed the sentence on count 10 (assault on Porfirio) under section 654.

Defendant timely appealed. Defendant challenges on appeal only his convictions for attempted murder (count 1) and assault with a deadly weapon as to Gabriela (count 8).

DISCUSSION

1. Sufficiency of the Evidence for Attempted First Degree Murder

Defendant contends there was insufficient evidence to support a conviction for attempted first degree murder committed with premeditation and deliberation. Upon a challenge to the sufficiency of evidence for a jury finding, we " 'review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " (*People v. Clark* (2011) 52 Cal.4th 856, 942.)

" 'A murder that is premeditated and deliberate is murder of the first degree.' [Citation.] ' "In this context, 'premeditated' means 'considered beforehand,' and 'deliberate' means 'formed or arrived at or determined upon as a result of careful thought and

weighing of considerations for and against the proposed course of action.’”’ [Citation.] ‘“An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse.”’ [Citations.] ‘The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly’ [Citation.]” (*People v. Potts* (2019) 6 Cal.5th 1012, 1027 (*Potts*).)

In *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*), the Court held that there are three basic categories of evidence sufficient to sustain a finding of premeditation and deliberation: (1) “facts about how and what defendant did prior to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing”; (2) “facts about the defendant’s prior relationship and/or conduct with the victim from which the jury could reasonably infer a ‘motive’ to kill the victim”; and (3) “facts about the nature of the killing from which the jury could infer that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a ‘preconceived design.’” (*Id.* at pp. 26–27.) “‘Since *Anderson*, we have emphasized that its guidelines are descriptive and neither normative nor exhaustive, and that reviewing courts need not accord them any particular weight.’ [Citation.]” (*People v. Rivera* (2019) 7 Cal.5th 306, 324.)

Defendant relies on the *Anderson* factors, and argues that here, there was no planning evidence, no evidence of a prior relationship with the victim from which the jury could infer a motive to kill, and the manner of killing was not so particular or

exacting to suggest defendant killed according to a “preconceived design.” Instead, he argues that his actions “were clearly the result of an unconsidered or rash impulse, rather than of ‘preexisting thought and reflection.’” Respondent points to evidence in support of the *Anderson* factors and argues the presence of all three factors is unnecessary for a finding of premeditation and deliberation. We conclude there was sufficient evidence defendant planned to kill someone for whom he mistook Porfirio, and the manner in which he attempted to stab the victim is consistent with a premeditated intent to kill.

Before defendant came to Porfirio’s house, he broke into Abraham’s home, and told him he was looking for someone and was going to kill that person. Defendant then broke into Maria’s house and asked several people inside, “Where is he?” Finally, defendant approached Porfirio’s house wielding a knife, broke in, and screamed at Porfirio, “I’m gonna kill you!” This was evidence from which the jury could reasonably infer that defendant was searching for someone he planned to kill, mistook Porfirio for that person, and tried to carry out his plan. (*Potts, supra*, 6 Cal.5th at p. 1027 [“The evidence that defendant arrived at the [victims’] home carrying a weapon suggests that the murders were planned.”].)

The manner of the attack also supports a finding of premeditation and deliberation. There were multiple stages of the attack—kicking in the door, reaching in a hand while slashing with the knife, grappling for the knife with Porfirio, slashing Porfirio’s fingers, biting Porfirio on the back and head, attempting to stab Porfirio. From this conduct, the jury could have reasonably concluded that defendant had multiple opportunities to consider and reflect on his actions, but chose to

continue with his plan to kill the victim. (See *People v. Streeter* (2012) 54 Cal.4th 205, 244 [manner of killing suggested premeditation and deliberation where “defendant’s acts occurred in stages”].) The prolonged manner of the struggle also afforded defendant “ample time . . . to consider the nature of his deadly act.” (See *People v. Hovarter* (2008) 44 Cal.4th 983, 1020.)

The jury could also reasonably infer from defendant’s having watched Porfirio’s wife go into the kitchen to fetch a weapon that he was not acting in a frenzy but was aware of what was happening around him. Defendant’s attempt to push the knife into Porfirio’s abdomen also suggests deliberation. (See *Anderson, supra*, 70 Cal.2d at p. 27 [“plunging a lethal weapon into the chest evidences a deliberate intention to kill.”].) Lastly, a jury could reasonably infer that a person who followed a prolonged attempted stabbing by calmly straightening his clothes and leaving the scene was not surprised and dismayed by what he had done, as one who acted impulsively might be. (See *Potts, supra*, 6 Cal.5th at p. 1028.)

This was sufficient evidence to support the jury’s finding that defendant attempted to commit a premeditated and deliberate murder.

2. Sufficiency of the Evidence for Assault

The jury also found defendant guilty of assault with a deadly weapon on Gabriela. Gabriela was in her bedroom when defendant burst in with a knife. Defendant argues that evidence he held a knife close to Gabriela’s chest was insufficient to show that he “did an act that by its nature would directly and probably result in the application of force” to her.

“An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.”

(§ 240.) Assault with a deadly weapon (§ 245, subd. (a)(1)) requires proof that the defendant willfully did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person. (*People v. Williams* (2001) 26 Cal.4th 779, 788.) “An assault occurs whenever ‘ “[t]he next movement would, at least to all appearances, complete the battery.” ’ [Citation].” (*Id.* at p. 786.) An assault may be committed by “ ‘[h]olding up a fist in a menacing manner, drawing a sword, or bayonet, [or] presenting a gun at a person who is within its range. . . . So, any other similar act, accompanied by such circumstances as denote an intention existing at the time, coupled with a present ability of using actual violence against the person of another, will be considered an assault.’ [Citation.]” (*People v. Raviart* (2001) 93 Cal.App.4th 258, 263.)

Here, Gabriela testified that defendant, a stranger, burst into a bedroom in her house, and pointed a knife at her while holding the blade three to four inches from her chest. Her husband testified defendant was covered in blood when he broke into their house. Defendant clearly had the present ability to use the knife that he wielded. The jury may have reasonably inferred from these circumstances and defendant’s action of pointing the knife inches away from Gabriela’s chest, that defendant’s next movement would have been to stab Gabriela had she not run out of the bedroom. This evidence was sufficient to uphold the jury’s finding that defendant committed assault with a deadly weapon.

3. *The Sentence Must Be Corrected*

Defendant argues, respondent concedes, and we agree that defendant's sentence must be corrected in four respects.² First, the trial court should have stricken the three one-year knife-use enhancements (§ 12022, subd. (b)(1)) attached to counts 8, 9 and 10 (§ 245, subd. (a)(1)) because use of a deadly or dangerous weapon is an element of the offense of assault with a deadly weapon. (See *People v. Memory* (2010) 182 Cal.App.4th 835, 838, fn. 1 [the People concede that knife-use enhancements imposed on assault with a deadly weapon conviction should be stricken].)

Second, the three-year prior prison term enhancement (§ 667.5, subd. (a)) attached to count 5 (attempted burglary) should be stricken because the enhancement does not apply to attempt crimes. (See *People v. Bedolla* (2018) 28 Cal.App.5th 535, 541 [section 667.5 enhancement does not apply to attempt crimes, including attempted burglary].)

Third, the trial court erred in imposing a three-year prior prison term enhancement (§ 667.5, subd. (a)) at the same time it imposed a five-year prior serious felony enhancement (§ 667, subd. (a)(1)) under count 2 (burglary) because the same robbery conviction was used to support both enhancements. (See *People v. Anderson* (2018) 5 Cal.5th 372, 426 [trial court may not impose enhancements under both sections 667.5 and 667 based on the same prior conviction].) The lesser three-year enhancement must be stricken. (*People v. Jones* (1993) 5 Cal.4th 1142, 1152 [where the section 667, subdivision (a), and section 667.5 enhancements arise from the same conviction, only the greater applies, and the proper remedy is to strike the lesser enhancement].)

² The parties briefed these issues in response to our request for letter briefs.

Fourth, the trial court erred in imposing a prior prison term enhancement (§ 667.5, subd. (a)) under each of counts 2, 3, 4 and 5 because offender status enhancements may only be imposed once. (See *People v. Williams* (2004) 34 Cal.4th 397, 402 [enhancements which go to the nature of the offender such as ones authorized by section 667.5 “are added only once as a step in arriving at the aggregate sentence”].) Because the prior prison term enhancement could not be imposed on counts 2 or 5, as explained above, and the trial court ordered count 3 to run consecutively, the three-year prison term enhancement imposed under count 4 (run concurrently) should be stricken. (See *People v. Sasser* (2015) 61 Cal.4th 1, 10 [enhancements do not attach to particular counts but instead are added just once as the final step in computing the total sentence].)

Finally, the parties concede, and we agree, that the abstract of judgment should be corrected to reflect (1) the base term for count 5 is six years, not ten years, and (2) the base term for counts 8 and 9 is eight years, not nine years.

DISPOSITION

The judgment is modified as follows: (1) the three one-year knife-use enhancements (§ 12022, subd. (b)(1)) imposed under counts 8, 9 and 10 (§ 245, subd. (a)(1)) are stricken; (2) the three-year prior prison term enhancement (§ 667.5, subd. (a)) imposed under count 5 (§§ 664/459) is stricken; (3) the three-year prior prison term enhancement (§ 667.5, subd. (a)) imposed under count 2 (§ 459) is stricken; (4) the three-year prior prison term enhancement (§ 667.5, subd. (a)) imposed under count 4 (§ 459) is stricken; and (5) the trial court is directed to prepare a new abstract of judgment in conformance with items (1)–(4) above and also to reflect that the base term for count 5 (§§ 664/459) is six

years, and the base term for both counts 8 and 9 (§ 245, subd. (a)(1)) is eight years. The court shall forward a copy of the amended abstract of judgment to the Department of Corrections.

The judgment is otherwise affirmed.

RUBIN, P. J.

I CONCUR:

MOOR, J.

The People v. Yony Lima
B296346

BAKER, J., Concurring

I concur in the majority’s disposition of defendant Yony Lima’s (defendant’s) appeal. I find it unnecessary, however, to postulate defendant mistook victim Porfirio as some other person defendant intended to kill. Because “[t]houghts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly” (*People v. Potts* (2019) 6 Cal.5th 1012, 1027), I conclude there is substantial evidence of premeditation and deliberation relying solely on the evidence of planning and the manner of killing—including defendant’s express declaration that he intended to kill Porfirio before attempting to plunge the knife into his stomach.

BAKER, J.